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December 16, 1999

Ex Parte Filing

Magalie Salas, Secretary
Federal Communications Commission
445 Twelfth Street, N.W.
12th Street Lobby, Room TW-A325
Washington, D.C. 20554

Re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, **CC Docket No. 96-98**

Dear Ms. Salas:

On December 16, Ed Shakin (Bell Atlantic), John Banks (BellSouth), Gary Phillips and Christopher Heinmann (SBC) , and Rachel Barkow and I met with Christopher Wright, Lawrence Bourne, Deborah Weiner and Paula Silberthau of the FCC to discuss issues in the above-captioned docket. The attached letter to Mr. Wright reflects the substance of the issues discussed in this regard.

One original and one copy of this letter are being submitted to you. If you have any questions concerning this matter, please contact me at (202) 326-7902.

Yours sincerely,

Michael K. Kellogg

Attachment

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December 15, 1999

VIA FACSIMILE

Christopher J. Wright, Esquire
General Counsel
Federal Communications Commission
445 12th Street, S.W.
Room 8C-723
Washington, DC 20554

Re: CC Dkt. No. 96-98, Fourth Further Notice of Proposed Rulemaking

Dear Chris:

In anticipation of our meeting tomorrow, I am writing to outline for you the issues that we would like to discuss.

In its *Fourth Further Notice of Proposed Rulemaking*[1] in this docket, as modified by its *Supplemental Order*, the Commission inquired whether "the 'just and reasonable' terms of section 251(c) or section 251(g) permit the Commission to establish a usage restriction" on combinations of loops and transport network elements so as to avoid special access bypass. *UNE Remand Order and Fourth FNPRM* ¶ 495; *Supplemental Order* ¶ 6.

The Commission has generally acknowledged that allowing such bypass prior to comprehensive universal service reform "would be undesirable as a matter of both economics and policy, because carrier decisions about how to interconnect with incumbent LECs would be driven by regulatory distortions in our access charge rules and

[1] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 99-238 (rel. Nov. 5, 1999) ("*UNE Remand Order and Fourth FNPRM*").

our universal service scheme, rather than the unfettered operation of a competitive market." *Local Competition Order*[2] ¶ 719. The Commission has expressed concern, however, that there may not be any basis in the Act or the Commission's rules under which incumbent LECs could decline to provide loop/transport combinations at UNE prices. *UNE Remand Order and Fourth FNPRM* ¶¶ 494-495, *Supplemental Order* ¶ 6; *see also* Separate Statement of Commissioner Harold Furchtgott-Roth, Concurring in Part, Dissenting in Part, *UNE Remand Order and Fourth FNPRM* (noting his view that "the statute supplies no basis for restricting a competitor's use of any network element or combination of network elements").

Accordingly, the purpose of our meeting is to demonstrate that the 1996 Act vests the Commission with ample discretion to impose a limit on access to the loop/transport combination that will preserve universal service and promote competition. We hope to make five points:

1. Any claim of a right to use loop/transport combinations for bypass must, as an initial matter, confront the Supreme Court's holding in *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999). That decision established that network elements must be provided under the terms of sections 251 and 252 only if the "necessary" and "impair" standards of section 251(d)(2) are satisfied. Section 251(d)(2) only requires access for non-proprietary elements if "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access *to provide the services that it seeks to offer.*" 47 U.S.C. § 251(d)(2)(B) (emphasis added). Accordingly, in judging whether a particular network element needs to be supplied, the Commission is inherently making a "service-related" decision.[3] Use of a UNE (or a combination of UNEs) may satisfy the "impair" standard for one service – such as ordinary local

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[2] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, *modified on recon.*, 11 FCC Rcd 13042 (1996), *vacated in part, Iowa Utils. Bd. v. FCC*, 120 F. 3d 753 (8th Cir. 1997), *rev'd in part, aff'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999) ("*Local Competition Order*").

[3] I recognize that, in its *Local Competition Order*, the Commission stated that "Section 251(c)(3) does not impose any service-related restrictions or requirements on requesting carriers in connection with the use of unbundled elements." *Local Competition Order*. ¶ 264. But the Commission's rationale for that holding was its premise that "network elements are defined by facilities or their functionalities or capabilities, and thus, cannot be defined as specific services." *Id.* Since the Commission concluded that network elements, so defined, must be unbundled wherever "technically feasible," it also concluded that "incumbent LECs may not impose restrictions upon the uses to which requesting carriers put such network elements." *Id.* ¶ 27. The Supreme Court, however, expressly rejected the Commission decision to require "blanket access to incumbents' network elements" on such an "unrestricted" basis. *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. at 735. Instead, the Court stressed, the Commission must give effect to section 251(d)(2), which only requires access for non-proprietary elements if "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking assess to provide the services that it seeks to offer." 47 U.S.C. § 51(d)(2)(B).

telephone service, which includes both exchange and exchange access – whereas it would not for another service (*e.g.*, special access).

2. Even aside from section 251(d)(2), section 251(c)(3) itself expressly permits the incumbent LEC to impose "just, reasonable, and nondiscriminatory" conditions on use of its UNEs. 47 U.S.C. § 251(c)(3). Requiring carriers that use UNEs for access to serve local end users meets this test for two principal reasons: it protects incumbent LECs' "receipt of compensation" from access charges as required by section 251(g), and it safeguards universal service until new funding mechanisms are in place. *See Competitive Telecomms. Ass'n v. FCC*, 117 F.3d 1068, 1074 (8th Cir. 1997) (explaining that "Congress did not intend that universal service should be adversely affected by the institution of cost-based rates" for UNEs) ("*CompTel*"); *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 437 (5th Cir. 1999) ("defer[ing] to the agency's reasonable judgment about what will constitute 'sufficient' support during the transition period from one universal service system to another").

3. Nothing in the language of Section 251(c)(3) precludes use restrictions on UNEs. That section begins by stating who may receive UNEs: LECs must provide UNEs "to any requesting telecommunications carrier." The section goes on to state that UNEs must be provided to these carriers "for the provision of a telecommunications service." The IXCs read this latter clause as if Congress had said "any telecommunications service" or "all telecommunications services" without restrictions. *See, e.g.,* Letter from Robert W. Quinn, Jr. to Lawrence Strickling, Attachment, August 19, 1999, at 4; Letter from Chuck Goldfarb to Larry Strickling, Attachment, August 20, 1999, at 4. But Congress plainly did not say that. When Congress uses different terms within a statute, it is presumed that Congress intended to establish different meanings for each word. *See, e.g., Russello v. United States*, 464 U.S. 16, 23 (1983) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion'") (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

Congress used the same basic formulation in 251(c)(3) that it used in the interconnection provisions of section 251(c)(2), where it said that interconnection is available "for the transmission and routing of telephone exchange service and exchange access," and in section 251(b)(5), which requires reciprocal compensation "for the transport and termination of telecommunications." The Commission has consistently read these provisions as "imposing limits" on the purposes for which a carrier may invoke the statutory arrangements. *Local Competition Order* ¶ 186. For example, the Commission has stated that "section 251(b)(5) reciprocal compensation obligations should apply only to traffic that originates and terminates within a local area." *Id.*

¶ 1034. It is clear, then, that this type of statutory formulation addresses the outer boundaries of what a requesting carrier may seek, not the terms and conditions under which the incumbent must provides facilities and services.

4. If section 251(c)(3) were not enough to resolve the matter, Congress included an additional provision in the 1996 Act that vests authority in the Commission to impose a condition that prevents access bypass: section 251(g). This provision contains express support for an eligibility requirement that would protect incumbents' "receipt of compensation" from access charges in order to fund universal service. As the Commission has explained, section 251(g) "provide[s] evidence of Congressional recognition of the potential tension between existing interconnection obligations, such as access charges, and the new methods of interconnection mandated by section 251." *Local Competition Order* ¶ 726.

The Commission has relied upon section 251(g) in the past to impose a condition on UNEs that would protect universal service. Specifically, the Commission cited 251(g) and section 4(i) of the 1934 Act to support its decision to impose an interim access charge on the switching UNE. Although the IXCs challenged the Commission's authority to do so, the Eighth Circuit rejected their arguments. In *CompTel*, the Eighth Circuit agreed with the Commission that "[c]learly Congress did not intend that universal service should be adversely affected by the institution of cost-based rates." Accordingly, the court of appeals held that it was permissible for the Commission to go so far as to impose access charges on purchasers of UNEs, notwithstanding that "such charges on their face appear to violate the statute." 117 F.3d at 1074.

Use restrictions on loop/transport combinations would have the same permissible purpose as the transitional plan approved by the Eighth Circuit: the protection of universal service. And, unlike the transitional access charge plan, such limits would not be inconsistent with any express provision of the Act. Therefore, the Commission may, as the Eighth Circuit held, balance support for universal service against the UNE requirements and strike an appropriate compromise that would not allow carriers to bypass access charges through UNEs and disrupt the measured course the Commission deemed necessary to safeguard universal services. *See also Southwestern Bell Tel. Co. v. FCC*, 153 F.3d, 523, 539 (8th Cir. 1998) (upholding the Commission's decision to impose residual per minute charges on originating, rather than terminating, access minutes because "[t]his transitional solution is a reasonable exercise of the Commission's discretionary authority to balance competing statutory goals").

Moreover, the Fifth Circuit has ruled that the Commission is entitled to deference about what will constitute "'sufficient' support during the transition period from one universal service system to another." *Texas Office of Pub. Util. Counsel v. FCC*, 183

F.3d 393, 437 (5th Cir. 1999). Indeed, the need to provide sufficient support to universal service is the very foundation of the Commission's transitional measure in the *UNE Remand Order and Fourth FNPRM* and the *Supplemental Order*. In order to avoid "a significant reduction of the incumbent LECs' special access revenues prior to full implementation of access charge and universal service reform," *UNE Remand Order and Fourth FNPRM* ¶ 489, the Commission prohibited IXCs from "convert[ing] special access services to combinations of unbundled loops and transport network elements" until June 30, 2000, *Supplemental Order* ¶ 4. The Commission could lawfully extend this prohibition until it has completed its access charge reforms if it concluded that such a transitional measure was necessary to protect universal service.

5. Finally, although the IXCs claim that the Commission lacks the authority to place any restrictions on UNEs, *see, e.g.*, Letter from Linda L. Oliver to Magalie R. Salas, July 30, 1999 at 2 (arguing that "the Act places no restrictions on the uses to which competitors may put network elements" and that "the Act does not permit distinctions to be drawn on the basis of the type of customer to be served"), the Commission has refuted this argument and limited a carrier's access to UNEs when necessary to effectuate the purposes of the Act.

For example, in the *UNE Remand Order*, the Commission concluded that ILECs must provide local circuit switching as a UNE nationwide. *See UNE Remand Order and Fourth FNPRM* ¶¶ 253, 275. The Commission then permitted an "exception" to this UNE requirement "under certain market conditions." *Id.* Specifically, the Commission provided an exception "where incumbent LECs have provided nondiscriminatory, cost-based access to combinations of loop and transport unbundled network elements, known as the enhanced extended link (EEL)," when requesting carriers are providing service "for end users with four or more lines within density zone 1 in the top 50 metropolitan statistical areas (MSAs)." *Id.* ¶ 253. The Commission believed it entirely "appropriate" to "relieve incumbents LECs from their unbundling obligations," *id.* ¶ 299, in those circumstances "to reflect significant marketplace developments," *id.* ¶ 278.

Similarly, in the Commission's recent *Line Sharing Order*,[4] it ordered ILECs to provide the high frequency portion of the loop as a UNE, but then limited the carriers eligible to receive such access. In particular, the Commission limited access "to a single requesting carrier, on loops that carry the incumbent's traditional POTS, to the extent that the xDSL technology deployed by the competitive LEC does not interfere with the analog voiceband transmissions." *Id.* ¶ 70. CLECs seeking to line share, then, "may deploy

[4] Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 98-147, 96-98 (rel. Dec. 9, 1999).

only xDSL-based services that conform with [the Commission's] existing criteria supporting a presumption of acceptability for deployment to ensure that these services will not interfere with analog voice frequencies." *Id.*

The Commission did not express a doubt regarding its authority to impose these limits on line sharing and switching. To the contrary, the Commission believed those limits were necessary to further the goals of the 1996 Act. And if the restrictions on switching and the high frequency portion of the loop are permissible under section 251(c)(3), there is nothing that prevents the Commission from imposing similar restrictions on the loop/transport combination.

There is, in short, no basis for the IXCs' suggestion that the Commission must adopt an all-or-none approach to UNEs. The Act plainly permits the Commission to set the boundaries for when UNEs must be available. Thus, it is well within the Commission's discretion to impose a limit on the loop/transport combination that prevents carriers from using UNEs solely to bypass access charges.

Sincerely,

/Michael K. Kellogg/reb

Michael K. Kellogg